IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants	)	

DEFENDANTS' JOINT MOTION *IN LIMINE* REGARDING ANY REFERENCE TO PLAINTIFF'S SETTLEMENT WITH WILLOW BROOK AND INTEGRATED BRIEF

Defendants respectfully move *in limine*, pursuant to Federal Rules of Evidence, 401, 402, and 408 (a) and Local Civil Rule 16.2(i) to preclude any reference or testimony at trial regarding settlement or settlement negotiations between Plaintiffs and defendant Willow Brook, as well as any reference or testimony regarding Plaintiffs' assertions that they were forced to continue their lawsuit against the remaining poultry companies in an effort to hold defendants responsible for poultry litter application in the Illinois Watershed.

BACKGROUND

In early 2009, Plaintiffs and Willow Brook entered into a settlement agreement wherein Willow Brook agreed to pay a settlement sum and the Plaintiffs' agreed to request Willow Brook's dismissal from the case. The Plaintiffs and Willow Brook sought the Court's approval of Partial Consent

Decree reflecting their agreement. Plaintiffs have also made public comments alleging that the suit against the remaining defendants had to continue after the Willow Brook settlement because of the remaining defendant's refusal to settle the matter and take responsibility for their portions of litter in the IRW. Allowing attorney comments or the admission of evidence regarding the settlement between Plaintiffs and defendant Willow Brook would be contrary to the public policy promoting settlement, is irrelevant to the issues in this case, and would be unfairly prejudicial to the remaining defendants. For these reasons, any reference or statements by any lawyers or witnesses regarding any aspect of the settlement between Plaintiff and Willow Brook should be excluded at trial.

ARGUMENT

I. REFERENCES OR TESTIMONY REGARDING SETTLEMENT NEGOTIATIONS BETWEEN PLAINTIFFS AND WILLOW BROOK, INCLUDING REFERENCES OR TESTIMONY RELATING THE WILLOW BROOK SETTLEMENT TO REMAINING DEFENDANTS, SHOULD BE EXCLUDED BECAUSE THEY VIOLATE THE POLICIES UNDERLYING RULE 408(a) OF THE FEDERAL RULES OF EVIDENCE

Rule 408(a) of the Federal Rules of Evidence states in part:

> (a) **Prohibited uses.**—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> > (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

> (2) conduct or statements made in compromise negotiations regarding the claim…

This rule exists to protect two public policies which are identified in the Advisory Committee Notes. The Notes state, "exclusion [of evidence of settlement] may be based upon two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position….[and] (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." Rule 408 Fed. R. Evid., Advisory Committee Note, 1972 Proposed Rules, 28 U.S.C.A. Rule 408 (West 2001).

The Advisory Committee also noted that these policies are further supported by the provisions in Rule 68 [Offer of Judgment] of the Rules of Civil Procedure which prohibit the terms of an offer or the mere fact of an offer of judgment to be admitted as evidence. This recurrent theme in both the civil procedure and evidence rules demonstrates the strength of the policy to promote resolution of cases short of trial.

Case law also supports this policy. "Rule 408 of the Federal Rules of Evidence states that 'evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.' This exclusionary rule reflects a well-recognized public policy in favor of non-litigious solutions to

disputes, which is equally applicable to insurance litigation. See *Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985)." *Southwest Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1257 (D. Colo. 2003)

The Northern District's Local Rules are also supportive of the policy to shield settlement conversations. LCvR16.2 (i) requires all parties and the Settlement Judge to keep confidential all written and oral communications made in connection with or during any settlement conference and specifically prohibits their use at trial, unless permitted by Fed. R. Evid. 408. This Court is both cognizant and protective of the need for confidentiality in settlement situations in keeping with the limitations of Rule 408. *See, Alexander v Phillip Morris USA, Inc.,* 2008 U.S. Dist. Lexis 51359 (N.D. OK., July 3, 2008)

In the present case there is no issue currently before the Court that would justify the presentation of any reference to or evidence of any settlement or settlement negotiations between Plaintiffs and Willow Brook, including comments regarding the Willow Brook settlement as it applied to remaining defendants. There is plainly no Rule 408 exception to be applied here and because such references or statements are a violation of the policies promoted by Rule 408 and LCvR 16.2(i), they should be prohibited.

II. REFERENCES OR TESTIMONY REGARDING THE FINAL SETTLEMENT BETWEEN PLAINTIFFS AND WILLOW BROOK, INCLUDING REFERENCES OR TESTIMONY RELATING THE WILLOW BROOK SETTLEMENT TO REMAINING DEFENDANTS, SHOULD BE EXCLUDED BECAUSE THEY VIOLATE THE POLICIES UNDERLYING RULE 408 OF THE FEDERAL RULES OF EVIDENCE

As stated previously, Rule 408 governs the admissibility of evidence of settlement or compromise offers. Furthermore,

> While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. The latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.
>
> Fed.Rule of Evid. 408, advisory committee note

McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. R.I. 1985)

The Federal Courts have held settlements between Plaintiffs and a third-party are inadmissible with regard to remaining defendants to prove liability or the validity of a claim, or its amount. See *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 246 (1st Cir. R.I. 1985). Speaking specifically regarding a third party's settlement as it applies to other defendants' liability, the Court in *McHann v. Firestorm Tire & Rubber* held

> Under Rule 408, "a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person, nor can plaintiff show the defendant's liability or extent of liability, by proof of defendant's settlement with a third person." 2 D. Louisell & C. Mueller, Federal Evidence § 171, at 290 (1978 & Supp.1983). See Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 2 Cir. 1982, 687 F.2d 563, 569; United States v. Contra Costa County Water District, 9 Cir.1982, 678 F.2d 90, 92.

McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 166 (5th Cir. Miss. 1983). In *McInnis v. A.M.F., Inc.,* the court upheld the policy articulated in *McHann* regarding Rule 408's exclusion of third party settlement evidence, stating

> A number of recent federal cases have adopted this position, holding that *Rule 408* bars evidence of settlements between plaintiffs and third party joint tortfeasors or former co-defendants. See Quad/Graphics, Inc., v. Fass, 724 F.2d 1230, 1235 (7th Cir. 1983) (evidence of plaintiff's settlement with two defendants in contract action not admissible at trial of remaining defendants); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 165-66 (5th Cir. 1983) (Plaintiff's covenant not to sue service station was not admissible in products liability action against defendant tire manufacturer); United States v. Contra Costa County Water District, 678 F.2d 90, 92 (9th Cir. 1982) (in suit by United States against water district for cost of erecting wall necessitated by actions of landowner, evidence of settlement between United States and landowner not admissible).

McInnis v. A.M.F., Inc., 765 F.2d 240, 247-248 (1st Cir. R.I. 1985).

Because evidence of a completed compromise is prohibited by Rule 408, references to and evidence of Plaintiffs' settlement agreement with Willow Brook, including references or testimony relating the Willow Brook settlement to the remaining defendants, should be prohibited in all phases of trial.

III. REFERENCE TO OR TESTIMONY REGARDING SETTLEMENT OR SETTLEMENT NEGOTIATIONS BETWEEN PLAINTIFFS AND WILLOW BROOK, INCLUDING REFERENCES OR TESTIMONY RELATING THE WILLOW BROOK SETTLEMENT TO REMAINING DEFENDANTS, SHOULD BE EXCLUDED BECAUSE IT IS IRRELEVANT

References or testimony regarding the settlement between Plaintiff and Willow Brook would have no probative value at trial and must therefore be

excluded. Federal Rule of Evidence 402 mandates that: "Evidence which is not relevant is not admissible." Further, "relevant evidence" is defined in Rule 401 as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

As noted by the court in *McInnis*,

> exclusion of evidence of settlement offers is justifiable . . . such evidence is of questionable relevance on the issue of liability or the value of the claim, since settlement may well reflect a desire for peaceful dispute resolution, rather than the litigants' perceptions of the strength or weakness of their relative positions.
>
> See Fed.Rule of Evid. 408, advisory committee note.

McInnis at 247.

Because the settlement between Plaintiffs and Willow Brook has no connection with the merits of any party's position, and because a party may enter into a compromise settlement for a multitude of reasons, such settlements have little if any probative value and therefore reference or evidence of them should be prohibited in all phases of a trial.

IV. REFERENCE TO OR TESTIMONY REGARDING SETTLEMENT OR SETTLEMENT NEGOTIATIONS BETWEEN PLAINTIFF AND WILLOW BROOK, INCLUDING REFERENCES OR TESTIMONY RELATING THE WILLOW BROOK SETTLEMENT TO REMAINING DEFENDANTS, ARE PREJUDICIAL AND SHOULD BE EXCLUDED UNDER FED.R.EVID. 403.

Even if any settlement references were to pass muster under Rule 408 and were relevant under Rule 401, they should still be excluded under Rule 403. The Tenth Circuit has long recognized that settlement statements can be prejudicial. "Permitting evidence of unsuccessful settlement negotiations also creates a very real potential for jury confusion and may suggest a decision on an improper basis. *See Weir v. Federal Insurance Co.*, 811 F.2d 1387, 1395 (10th Cir. 1987)." *Southwest Nurseries, LL v. Florists Mut. Ins., Inc.*, 266 F.Supp. 2d 1253, 1259 (D. Colo. 2003). Plaintiffs' comments regarding defendants' unwillingness to settle and take responsibility for litter in the IRW is the very definition a prejudicial statement. Because of this potential prejudice the trial could become longer. As noted by the *Southwest Nurseries* court:

> At trial, a party's settlement offer could not be considered in a vacuum, but rather would have to be evaluated in the full context of settlement negotiations. That would necessarily involve testimony explaining negotiation strategies and the thought processes of the settlement participants. The parties might well feel compelled to offer testimony from their respective counsel to explain their settlement strategies and the rationale for any offers or counter-offers. Jury confusion seems inevitable. *Cf. Equal Employment Opportunity Commission v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1546 (10th Cir. 1991) ("The risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 require[s] exclusion even when a permissible purpose can be discerned"). Here, the potential for unfair prejudice and jury confusion far outweighs the probative value of evidence concerning settlement negotiations.

Id.

The *McInnis* court came to the same conclusion, finding that the admission of evidence of settlement between plaintiff and a third party or former co-

defendant was prejudicial, and the admission of such evidence necessitated a new trial. See *McInnis* at 246.

As the possibility of prejudice is very real and allowing references to settlement will potentially create the need for additional testimony to place such references into context, any such references should be prohibited.

CONCLUSION

For the reasons that references to or testimony regarding settlement negotiations is contrary to the policies supported by Rule 408 and LCvR 16.1, are irrelevant under Rules 401 and 403, and prejudicial under Rule 403, Defendants' Motion *in Limine* should be granted and all such references or testimony should be prohibited.

Respectfully submitted,

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